**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JEFF B. RUBOTTOM**<br>Claimant<br><br>VS.<br><br>**LAIRD NOLLER FORD, INC.**<br>Respondent<br><br>AND<br><br>**KANSAS AUTOMOBILE DEALER WORKERS COMPENSATION FUND**<br>Insurance Carrier | ) | Docket No. 1,034,608 |

# ORDER

## STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 15, 2010, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) ordered respondent to pay claimant temporary total disability compensation commencing September 23, 2010, until claimant reaches maximum medical improvement or until he is returned to gainful employment. Respondent was further ordered to pay for medical treatment on claimant's behalf with Dr. James Eyman until further order or until claimant is certified as having reached maximum medical improvement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 14, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

## ISSUES

Respondent argues the ALJ erred by ordering psychological treatment and temporary total disability compensation, contending claimant's need for the benefits was caused by a subsequent intervening non-work related injury and a chronic personal medical condition. Respondent further contends the ALJ erred in awarding temporary total disability benefits as claimant offered no medical evidence that he was temporarily totally disabled.

Claimant asserts that he has proved his present need for psychological treatment is directly traceable to his February 13, 2007, injury. In regard to respondent's contention that he is not entitled to temporary total disability benefits, claimant argues the Board does not have jurisdiction to review this preliminary hearing issue.

The issues for the Board's review are:

(1) Did claimant prove that his present need for psychological treatment is directly traceable to his February 13, 2007, work-related injury?

(2) Does the Board have jurisdiction to decide the question of whether claimant is temporarily totally disabled on an appeal from a preliminary hearing Order? If so, is claimant temporarily and totally disabled?

## FINDINGS OF FACT

Claimant worked for respondent as a sales person, which required him to be on his feet all the time, standing and walking on pavement and concrete. He was injured at work on February 13, 2007, when the bucket of a skid loader came down and hit his left foot. Claimant suffered a crush injury which required the amputation of his left small toe. A few days after the amputation, claimant developed an infection in his foot and was hospitalized for a week. Claimant then returned to work and worked until September 2010. Claimant testified, however, that although he continued to work during this period, the constant walking and standing on pavement and concrete caused him pain in his injured foot that went up his leg, into his back, and sometimes up to his neck. He stated the pain also affects his hips.

In January 2008, claimant was seen by Dr. Kathleen Keenan, a licensed psychologist, at the request of the ALJ, for an independent psychological examination.[1] Dr. Keenan noted that claimant's interview and the results of psychological testing suggested claimant was suffering from depression and severe anxiety. Dr. Keenan opined

[1] Claimant had previously been evaluated by Dr. Ethan Bickelhaupt on June 22, 2007, at the request of claimant's attorney. Dr. Bickelhaupt recommended treatment of claimant's mood disorder.

that claimant's work-related injury triggered the cycle of physical and emotional distress that caused his depression and anxiety. She recommended claimant be referred to a psychologist experienced in behavioral pain management and stress management.

After receipt of the report of Dr. Keenan, the ALJ ordered respondent to provide psychological treatment to claimant with Dr. James Eyman until further order.[2] Claimant testified that during his psychological treatment, Dr. Eyman told him the only thing they could talk about was his problems regarding his foot. Claimant said they talked about how he could return to work or if he would need to find a different type of work. Dr. Eyman released claimant from treatment on September 4, 2008. On that date, Dr. Eyman wrote the ALJ stating: "[Claimant's] depression is no longer significantly interfering with his functioning . . . I told [claimant] that if any further psychological or pain problems arise related to the work injury, I would be happy to treat him."[3]

Claimant's authorized treating physician for his foot was Dr. Marc Baraban, who performed the amputation procedure on claimant's toe, followed by Dr. James Hamilton. He was also seen by Dr. Greg Horton. The last time claimant saw Dr. Horton before the preliminary hearing was on March 2, 2010. At that time, Dr. Horton recommended surgery on claimant's foot. Dr. Horton believed the likelihood of claimant being worse after the surgery than before the surgery was quite low, and the likelihood of having some improvement was very reasonable. Apparently respondent authorized the proposed surgery, but claimant backed out, claiming he had three other physicians who had proposed different surgeries to treat his condition and he wanted a fifth opinion from a doctor chosen by his VA doctor. Claimant contends he is not refusing to have another surgery but is putting off the decision until he sees the doctor recommended by his VA doctor.

Claimant said that he has received treatment from the VA for 22 years, since his discharge from the Army. He has been treated for chronic low back pain and admits he has had low back pain for a long time. In September 2010, claimant was seen at the VA because, as claimant testified, he was having a lot of stress at work because of the pain in his foot and the problems he was having with his boss. He said when he saw the doctor at the VA, he "lost it."[4] On September 22, 2010, Dr. Keith Pattison, a psychiatrist at the VA, and Dr. David Rieb, a licensed clinical psychologist at the VA, jointly wrote a letter "To whom it may concern" in which they stated:

> It is the recommendation of Dr. Keith Pattison and Dr. David Rieb, Mental and Behavioral Health providers, that Mr. Jeff Boy Rubottom be extended a leave

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[2] ALJ Order (March 14, 2008).

[3] Correspondence from Dr. James Eyman to ALJ (filed September 5, 2008).

[4] P.H. Trans. at 10.

> of absence of up to 30 days; resulting from current increases in anxiety and depression, secondary to chronic pain and work/life stressors.[5]

Drs. Pattison and Rieb extended this leave of absence an additional 30 days in an addendum note added to the above letter.[6]

Claimant returned to Dr. Eyman on September 28, 2010, with complaints of depression and anxiety. Dr. Eyman's clinical records from September 28 through November 29, 2010, show the theme or focus of intervention being, as well as pain in his foot, claimant's rotator cuff surgery, physical therapy after his shoulder surgery, and caring for his grandchildren. It appears that most of Dr. Eyman's treatment involved management of claimant's depression, pain management, and discussions involving a change of careers due to claimant's pain when walking or standing. Claimant said he mentioned to Dr. Eyman the decision he needed to make about whether to have another surgery on his foot, although Dr. Eyman did not provide any assistance in making this decision. Claimant also mentioned problems he was having with his boss several times, and on October 28, 2010, claimant specifically told Dr. Eyman that he felt mistreated by his supervisor at work. Claimant testified:

> My disagreement with my boss is, he's on me all the time about if I say my foot–oh, you use that against it. Oh, it's the little comments walking away, too. Oh, is your foot bothering you?[7]

Claimant admits he injured his rotator cuff at home and had surgery to repair his rotator cuff on October 15, 2010. He said the fall at home occurred about a year before his rotator cuff surgery. He denied that he was taken off work because of the surgery and said he would have been able to work, albeit while wearing a sling, if he had not been taken off work by the doctors at the VA Hospital. Claimant said he told Dr. Eyman about the rotator cuff surgery to keep him up to date, but he and Dr. Eyman did not discuss any emotional problem he may have had concerning the shoulder problem.

Claimant also admitted that he had been involved in a motor vehicle accident sometime after the accident at work. He claimed the motor vehicle accident caused him a severe increase in his low back pain. Again, he denied that he and Dr. Eyman had any discussions concerning his motor vehicle accident but limited their sessions to discussions regarding claimant's problems resulting from his foot condition.

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[5] P.H. Trans., Cl. Ex. 1 at 1.

[6] *Id.*

[7] P.H. Trans. at 8.

## PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[8] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a

[8] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems are compensable. "[W]e have held that traumatic neurosis *following physical injury,* and shown to be directly traceable to such injury, is compensable under the act."[11] However, the court in *Berger*[12] cautioned:

> Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.

In *Love*,[13] the Kansas Court of Appeals stated:

> In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq*., the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

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[9] K.S.A. 2010 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[11] *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 616, 412 P.2d 986 (1966).

[12] *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 550, 506 P.2d 1175 (1973).

[13] *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's need for medical treatment or other workers compensation benefits rather than the work-related injuries.[14]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[16]

## ANALYSIS

Claimant suffered a compensable work-related injury to his left foot in February 2007 that resulted in the amputation of his small toe. Since then, claimant has had difficulty with the prolonged walking and standing that his job with respondent requires. Claimant relates this causes him pain from his foot, up his leg into his hips and back and sometimes up to his neck. Claimant has a history of chronic back pain and has had subsequent accidents affecting his back and his right shoulder. Claimant sought psychological treatment and, in January 2008, pursuant to a court-ordered independent medical examination, Dr. Keenan opined that claimant's work injury triggered his psychological problems and required treatment. Dr. Eyman was authorized and treated claimant until September 2008. Claimant returned to Dr. Eyman in September 2010 with similar symptoms and complaints.

The question now is whether claimant's current psychological problems and need for additional treatment are a direct consequence of his work-related foot injury. The VA psychologists, Drs. Pattison and Rieb, recommended claimant receive treatment and that he be off work temporarily due to "current increases in anxiety and depression, secondary to chronic pain and work/life stressors."[17] The doctors do not specify what pain or what is causing the stressors, but claimant attributes these to his work injury. He believes that his injuries inhibit his ability to do his job and cause problems at work, including his relationship with his boss. Dr. Eyman says these are the problems being discussed with claimant as well. Although the pain and limitations from the foot injury and the resulting problems at

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[14] See *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[15] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[16] K.S.A. 2010 Supp. 44-555c(k).

[17] P.H. Trans., Cl. Ex. 1 at 1.

work and at home are not the exclusive problems claimant discusses with Dr. Eyman, they do appear to be dominant. Dr. Eyman's report dated December 13, 2010, states that he is treating claimant again with "psychotherapy related to a re-occurrence of psychological symptoms from his work-related injury in February 2007."[18]

Based upon the record presented to date, this Board Member finds that claimant has met his burden of proving that his recent need for psychological treatment is directly traceable to his February 13, 2007, work-related injury. K.S.A. 44-534a gives the ALJ authority to determine whether an injured worker is in need of medical treatment and whether that worker is temporarily and totally disabled. The ALJ did not exceed his jurisdiction in awarding temporary total disability benefits.

On an appeal from a preliminary hearing order, the Board is without jurisdiction to review whether claimant has met his burden of proving that he is temporarily and totally disabled.

## CONCLUSION

(1) Claimant's need for psychological treatment is directly traceable to his physical injury of February 13, 2007.

(2) The issue of whether claimant is temporarily totally disabled is not subject to review on an appeal from a preliminary hearing order.

## ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated December 15, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of March, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[18] P.H. Trans., Cl. Ex. 6.